Supreme Court, U.S.
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No. 03-524

IN THE

Supreme Court of the United States

WILBERT SKIPPER, JR., *et al.*,
Petitioners,

v.

GIANT FOOD INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners have standing to seek review of the rulings denying class certification in light of the fact that all of their claims were dismissed from the case by summary judgments that are final and no longer subject to review.

2. Whether the Court of Appeals correctly held that the District Court acted within its discretion in (a) deciding petitioners' motion for class certification and respondent's motions for summary judgment on the same day; (b) deciding the class certification motion based on affidavits, briefing, and oral argument; and (c) denying class certification after finding that petitioners had not satisfied Fed. R. Civ. P. 23(a)(2), (3), and (4), or any of the requirements of Fed. R. Civ. P. 23(b).

3. Whether this Court has jurisdiction to review a discovery order that was not properly appealed and that was well within the District Court's discretion.

CORPORATE DISCLOSURE STATEMENT

Respondent Giant Food Inc. is wholly owned by Royal Ahold, a publicly-held company.

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BRIEF IN OPPOSITION

RULES INVOLVED

Rule 23 of the Federal Rules of Civil Procedure and Rule 4 of the Federal Rules of Appellate Procedure are reproduced in respondent's appendix ("Resp. App."), which is attached.

STATEMENT

A. Giant Food Inc. and This Litigation

During the relevant time period, respondent Giant Food Inc. ("Giant") was operating approximately 150 supermarkets across five states and the District of Columbia. It serviced and supported these supermarkets through over half a dozen warehouses, two salvage/recycling centers, and several manufacturing facilities, which were located in different cities and towns throughout the region. Petitioners' Appendix

("Pet. App.") 4a. Each of these operations was conducted through numerous different departments, managed by scores of different supervisors. *Id.* Throughout this period, Giant employed, for its warehousing, recycling, and manufacturing operations alone, thousands of workers — unionized and non-unionized, permanent and temporary — in over 265 positions. *Id.*

Petitioners are nine African-Americans who were employed in a variety of positions in different Giant warehouses and salvage/recycling centers, and one African-American who was employed in a Giant supermarket. They, along with two others, brought suit in 1996 in the United States District Court for the District of Maryland against Giant and several Giant officials,[1] complaining of a variety of alleged instances of discriminatory treatment, in violation of Title VII, 42 U.S.C. § 1981, and other federal and state laws. Pet. App. 2a-4a. Specifically, petitioners alleged racial discrimination in every aspect of employment — in hiring, training, promotion, discipline, and termination — regardless of whether they themselves had been subjected to such purported discrimination. Pet. App. 16a. They asserted individual claims of discrimination and claims of discrimination on behalf of virtually every other African-American worker at Giant. Pet. App. 15a-16a.

After lengthy discovery on both their individual claims and their purported class claims,[2] in early 2001, petitioners moved to stay proceedings indefinitely, which Giant opposed and which the District Court denied. Supplemental Joint Appen-

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[1] Although the petition names these officials as respondents, no ruling concerning any of those individuals is referenced in the petition. Thus, the references herein to "respondent" refer to Giant Food Inc.

[2] Discovery was stayed from late 1997 to mid-1999 pending resolution of an interlocutory appeal of an unrelated issue. *See Carson v. Giant Food, Inc.*, 175 F.3d 325 (4th Cir. 1999).

dix ("SJA") 44.[3] During a hearing held on the stay motion, petitioners requested additional time to file their motion for class certification and asked to be allowed to file their certification motion approximately a month after the deadline for summary judgment motions. SJA 44-46. The District Court granted these requests. SJA 46; Pet. App. 212a-213a.[4]

On July 3, 2001, several days after their requested deadline, petitioners filed their motion for class certification. In their motion, petitioners asked the District Court to certify: (1) a sub-class of "all current, former and future African American persons who were permanent union employees" in Giant's warehousing, recycling, and manufacturing operations, as to whom it alleged racial discrimination in hiring, promotion, discipline, training, and termination, and a hostile work environment; and (2) a sub-class of "all African American persons who are former, current and future vacation relief workers" who were rejected for permanent employment at Giant warehouses, as to whom it alleged racial discrimination in hiring and promotion. Pet. App. 3a-4a.[5] In support of their motion, petitioners submitted "2 statistical reports," and "excerpts from 25 depositions, 75 affidavits and 100 other exhibits." Pet. 6.

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[3] The "Supplemental Joint Appendix" refers to the supplemental appendix that was filed in the Court of Appeals.

[4] Petitioners' suggestion that the District Court ordered petitioners to file their motion for class certification after respondent filed its motions for summary judgment, Pet. 7-8, 13, is flat wrong, SJA 44-46.

[5] Both the District Court and the Court of Appeals properly declined to consider a late-filed memorandum in which petitioners sought to redefine the proposed sub-classes from two to four. *See* Pet. App. 42a n.2, 12a n.3. The District Court noted, however, that even if petitioners' proposed revision were considered, "the same analysis would apply and the amended proposed subclasses would also fail." Pet. App. 42a n.2.

B. The District Court's Rulings

After considering all the briefs and the evidence submitted by both parties, and also hearing oral argument, on February 20, 2002, the District Court entered an order denying petitioners' motion for class certification. Pet. App. 52a. In an accompanying opinion, the District Court found that the proposed sub-classes failed to satisfy three of the four requirements mandated by Fed. R. Civ. P. 23(a): commonality, typicality, and adequacy of representation. As to the typicality and commonality requirements, the court found that

> this litigation involves an aggregate of individual disparate treatment claims. Moreover, during the course of their careers, the putative class members worked in at least thirteen different facilities, located in five different towns or cities. . . .

Pet. App. 18a (footnote omitted).[6]

Even if those requirements had been met, the court continued, petitioners had failed to satisfy Rule 23(a)(4)'s requirement that "the representative parties will fairly and adequately protect the interests of the class." Pet. App. 18a-19a.

Finally, the District Court found that petitioners did not satisfy the additional requirements of Rule 23(b)(2) or Rule 23(b)(3).[7] Specifically, the court held that petitioners did not satisfy Rule 23(b)(2) because the relief they sought was primarily monetary, not injunctive. Pet. App. 19a. It

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[6] The District Court also found that "[p]laintiffs ha[d] not identified any neutral practice or policy that lies at the basis of their claims," so as to enable them to pursue a disparate impact theory of liability. Pet. App. 17a. Petitioners point to no abuse of discretion or error regarding this finding. Pet. 16-17.

[7] Petitioners only sought certification under (b)(2) or (b)(3); they never claimed to have satisfied Rule 23(b)(1).

also held that common questions of fact or law did not predominate over questions affecting the individuals, as required by Rule 23(b)(3). *Id.*

The District Court then addressed each petitioner's individual claims of discrimination, and, in a series of individual opinions issued that same day, granted summary judgments for respondent on all of the claims being asserted by petitioners. Pet. App. 23a-32a, 54a-135a.[8] The petition does not seek review of those summary judgment rulings.

In a separate order, also issued on February 20, 2002, the District Court directed respondent to pay petitioners $25,000 for extra costs incurred by their expert as a result of mistaken statistical information provided by Giant during discovery. Pet. App. 195a. As the court subsequently explained, "Giant's mistake was entirely inadvertent." Pet. App. 196a.

Four days later, plaintiff Carson and petitioners Newman and Blocker asked the District Court, through a letter from their counsel, to "alter and amend" its February 20, 2002 order. Joint Appendix ("JA") 13953-55.[9] Specifically, they asked the Court to limit the award to the three of them and to increase the amount of the award in order to recoup certain attorney fees and costs. *Id.* Petitioners based these requests on principles of fairness and equity. JA 13954. Nowhere in this letter do petitioners raise any issue pertaining to attorney-client privilege. *Id.*

On April 2, 2003, the District Court denied petitioners' request to "alter and amend." Pet. App. 196a-198a. In its memorandum and order, the court directed petitioners' attorney to distribute the award to petitioners in the proportion in

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[8] The plaintiff as to whom the District Court declined to grant summary judgment (Gregory Carson) later settled and dismissed his complaint.

[9] The "Joint Appendix" refers to the original appendix filed in the Court of Appeals.

which they had incurred extra costs, and ordered her not to retain any portion of this award for herself. *Id.* Petitioners took no further action on this issue in the district court.

On March 19, 2002, petitioners appealed, to the United States Court of Appeals for the Fourth Circuit, the "[o]rders denying Class Certification and the dismissal of each of their individual claims." Resp. App. 4a. On April 9, 2002, petitioners filed what they styled a "Supplemental Consolidated Notice of Appeal," in which they sought to appeal "[o]rders dated February 20, 2002 and March 2, Orders denying their award for all costs, fees and as well as all other issues concerning the award of Sanctions." Resp. App. 8a.

C. The Court of Appeals' Affirmance

The Fourth Circuit (Wilkins, C.J., and Wilkinson and Luttig, JJ.), in a *per curiam* opinion, affirmed the District Court's denial of class certification. Pet. App. 1a. It held that the District Court had not abused its discretion in this case. Pet. App. 6a.

Specifically, the court found that in light of the number and variety of operations, physical facilities, departments, positions, supervisors, and workers involved, "the facts will vary widely from worker to worker in cases of disparate treatment, and they will vary widely from warehouse to warehouse in cases of a hostile work environment." Pet. App. 5a. It concluded: "Given the individualized nature of plaintiffs' claims in each subclass, the district court did not err in holding plaintiffs failed to satisfy the commonality and typicality requirements of Rule 23(a)." *Id.* The Court of Appeals also found "no error in the district court's conclusion that adequacy of class representation was lacking in this case." Pet. App. 5a. Further, the Court of Appeals held that, even if petitioners had satisfied the prerequisites of class certification under Rule 23(a), "certification would still be

improper in this case because plaintiffs cannot satisfy *any* of the Rule 23(b) criteria." Pet. App. 6a (emphasis supplied).

In a footnote, the Court of Appeals also rejected petitioners' assertion that the District Court had decided the motions for summary judgment before ruling on the motion for class certification. Pet. App. 13a n.4. It held that the record did not sustain petitioners' premise: "It is not clear from the record that the district court actually ruled on the merits of the summary judgment motion first." *Id.* Moreover, even if it were assumed *arguendo* that the court had done so, the Court of Appeals pointed out, Fed. R. Civ. P. 23(c)(1) requires only that the trial court decide a class certification motion "[a]s soon as practicable," and petitioners had "not demonstrated that the district court ran afoul of that requirement." *Id.*

The Court of Appeals also affirmed the District Court's summary judgment rulings. Pet. App. 7a-12a.

Petitioners sought rehearing and rehearing *en banc*, which was denied. Pet. App. 150a.

REASONS FOR DENYING THE WRIT

Petitioners complain of the District Court's denial of their motion for class certification. Petitioners, however, have no standing to complain about these rulings as they are no longer parties to this litigation. Moreover, even if the certification issue were properly before this Court, there is no reason for review. The District Court's certification ruling involved the routine application of Fed. R. Civ. P. Rule 23. And, the Court of Appeals' affirmance of the District Court's discretionary ruling was plainly correct under well-settled law.

Petitioners implicitly concede that the Court of Appeals' ruling does not conflict with that of any other circuit or of this Court. Instead, they ask this Court to grant their petition in order to "set a necessary standard for the lower courts to follow and to increase their and all litigants' understanding of

the intent and application of Rule 23 in civil rights cases." Pet. 14. But the law already could not be clearer on that point.

In *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979), this Court held that a class action is appropriate only when it will promote efficiency and fairness . *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161 (1982), this Court made clear that "a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23[] have been satisfied." And, because class certification is a management tool for district courts, district courts are accorded wide discretion as to whether to certify a case for class treatment. *Califano*, 442 U.S. at 703.[10]

The District Court adhered to this well-settled law, and after applying it, concluded that petitioners had failed to satisfy the requirements of Rule 23. The Court of Appeals agreed. Its holding, like the District Court's, rests on several independent requirements for class certification, each of which petitioners failed to meet. There is no basis for reviewing those rulings yet again.

ARGUMENT

I. PETITIONERS LACK STANDING TO SEEK REVIEW OF THE CLASS CERTIFICATION RULINGS.

Judgments have been entered against all of the petitioners on all of their claims, and all of those judgments have been affirmed on appeal. And, because petitioners do not seek review of those judgments on certiorari, they are now final and not subject to review.

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[10] *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148 (2003), which petitioners cite without explanation, Pet. 1 n.1, does not concern any issues raised in the petition.

Having had final and non-reviewable judgments entered against them, petitioners no longer possess a case or controversy against Giant or a personal stake in the outcome of this case. They therefore lack standing to complain about the rulings on class certification. *See Blum v. Yaretsky*, 457 U.S. 991, 1001 n.13 (1982) ("Unless these [class representatives] can thus demonstrate the requisite case or controversy between themselves personally and [the defendants], none may seek relief on behalf of himself or any other member of the class." (internal quotations omitted)); *Board of School Comm'rs v. Jacobs*, 420 U.S. 128, 129 (1975) (*per curiam*) (no case or controversy exists where the representative plaintiffs' substantive claims are mooted before a class is certified); *Warth v. Seldin*, 422 U.S. 490, 502-04 (1975) (petitioners who have no "present interest" in the case lack standing to maintain an appeal of a class action case); *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("[I]f none of the named plaintiffs purporting to represent a class establishes the requisite case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class."). Thus, this petition must be denied insofar as it seeks review of the rulings denying class certification.

II. THE COURT OF APPEALS CORRECTLY HELD THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING CLASS CERTIFICATION.

Even if they had standing, this petition should be denied as petitioners fail to show any conflicts or errors with respect to the certification rulings.

A. Proper Procedures Were Followed.

1. *Timing of Ruling* — Petitioners complain, without any support, that the District Court decided the summary judgment motions before denying class certification. Pet. 6. But,

as the Court of Appeals pointed out, "[i]t is not clear from the record that the district court actually ruled on the merits of the summary judgment motion first." Pet. App. 13a n.4. Plainly, the District Court's opinion first analyzed and rejected class certification, and only then turned to the first of a series of summary judgment rulings. *Compare* Pet. App. 15a-19a, *with* Pet. App. 19a-53a.[11]

Moreover, even if petitioners' supposition were supported by the record, that would not have been error — much less a reason for certiorari. As the Court of Appeals correctly noted, Rule 23 "requires only that the question of class certification be decided 'as soon as practicable after the commencement of an action brought as a class action.'" Pet. App. 13a n.4 (quoting Fed. R. Civ. P. 23(c)(1)).[12] It was petitioners themselves who for years delayed moving for class certification, waiting to do so until after the close of all discovery, after summary judgment motions had been filed, and after the deadline they requested had passed. After they finally submitted their motion, the District Court heard oral argument and issued its decision approximately a month later. *See* JA 13725; Pet. App. 14a. As the Court of Appeals found, there was no evidence that this decision was not rendered as soon as practicable.

Finally, there is no conflict on this point — within the Fourth Circuit or among the circuits. The majority, if not all, of the circuits addressing this issue have held that trial courts

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[11] This approach makes perfect sense: As this Court has recognized, "the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982) (quotation omitted).

[12] Indeed, *Nelson v. Murphy*, 44 F.3d 497 (7th Cir. 1995), *cert. denied*, 516 U.S. 1027 (1995), a case upon which petitioners rely, stands for this very proposition — not for the proposition that summary judgment may never been decided before class certification. *Id.* at 500.

have the discretion to decide when to address summary judgment motions vis-à-vis class certification motions. *See, e.g., Cowen v. Bank United, FSB*, 70 F.3d 937, 941-42 (7th Cir. 1995); *Floyd v. Bowen*, 833 F.2d 529, 534-35 (5th Cir. 1987); *Marx v. Centran Corp.*, 747 F.2d 1536, 1552 (6th Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985); *see also* 7B Charles Alan Wright et al., *Federal Practice and Procedure* § 1785, at 128 (2d ed. 1986). Indeed, the Fourth Circuit has expressly *rejected* the "argument that a district court may not determine the issue of summary judgment before the issue of class certification." *Player v. Maher Terminals, Inc.*, Nos. 87-3535, 87-3575, 1988 WL 4581, at *1 (4th Cir. Jan. 19, 1988) (*per curiam*).[13] And the cases petitioners cite, Pet. 10-11, hold no differently. *See Chavez v. Illinois State Police*, 251 F.3d 612, 630 (7th Cir. 2001) ("If 'as soon as practicable' occurs after a case is already 'ripe for summary judgment' then it might be proper for a judge to consider a motion for summary judgment prior to considering a motion for class certification."); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 299 n.7 (1st Cir. 2000) (First Circuit makes clear that it was not deciding the "appropriateness of delaying a class certification ruling until after acting upon an

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[13] Petitioners mistakenly rely on *Nance v. Union Carbide Corp.*, 540 F.2d 718 (4th Cir. 1976), *vacated on other grounds*, 431 U.S. 952 (1977), to support their argument, Pet. 9-10, but nowhere in that case does the Fourth Circuit discuss the appropriateness of deciding a summary judgment motion before a class certification motion. It referred to Rule 23(c) simply for the unremarkable proposition that class status could not be conferred after judgment had been entered in the case. 540 F.2d at 723 n.9. Moreover, subsequent to *Nance*, the Fourth Circuit decided *Player*, making its position on this issue crystal clear.

To the extent a conflict exists or may exist within the Fourth Circuit, petitioners had full opportunity to make this argument when they sought rehearing *en banc*, which the Fourth Circuit declined to grant. Pet. App. 150a-51a. This issue certainly is not one for this Court to address on certiorari.

individual plaintiff's summary judgment motion."); *Peritz v. Liberty Loan Corp.*, 523 F.2d 349, 350-52 (7th Cir. 1975) (the class determination was not made until after trial; the court did not address the respective timing of summary judgment and class certification rulings).

The Court of Appeals correctly found that the District Court did not abuse its discretion by deciding the class certification and summary judgment motions on the same day, and there is no basis for reviewing this ruling.

2. *Evidentiary Hearing* — Petitioners' argument with respect to desiring an evidentiary hearing, Pet. 18-20, has no support. As petitioners implicitly recognize, such hearings are not required by Rule 23 or any other rule of law. *See, e.g., International Woodworkers v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1268 (4th Cir. 1981) ("[i]t is not essential to the resolution of every class certification motion that the trial court conduct a hearing").[14] Petitioners argue that because, in their view, there were "significant issues" raised by their motion for class certification, the District Court "should" have conducted an evidentiary hearing. Pet. 19.[15] But, petitioners' mere disagreement with the manage-

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[14] The cases petitioners cite, Pet. 18-19, hold no differently. In *Shelton v. Pargo, Inc.*, 582 F.2d 1298 (4th Cir. 1978), the Fourth Circuit held only that a district court must conduct a hearing before approving a "voluntary pre-certification settlement of a [putative class] action," *id.* at 1314, not a motion for class certification. And none of the three district court cases petitioners cite holds that Rule 23 requires an evidentiary hearing. *See Hoffman v. Honda of Am. Mfg., Inc.*, 191 F.R.D. 530 (S.D. Ohio 1999); *McGlothlin v. Connors*, 142 F.R.D. 626 (W.D. Va. 1992); *Haywood v. Barnes*, 109 F.R.D. 568 (E.D.N.C. 1986).

[15] Petitioners claim that their counsel's adequacy was one of the purported "significant issues" that "should have [been] the subject of a suitable hearing." Pet. 19. The record, however, establishes that, during the oral argument on the motion for class certification, the District Court heard extensive argument from petitioners' counsel concerning the

ment procedures employed by the District Court does not amount to an abuse of discretion — as the Court of Appeals correctly recognized.

B. The Conclusions that Petitioners Had Not Satisfied Rule 23(a) Were Properly Affirmed.

For class certification, plaintiffs must show that they satisfy all of the four requirements of Fed. R. Civ. P. 23(a). The District Court held, and the Court of Appeals agreed, that petitioners had failed to meet not just one, but three of the four requirements. Petitioners offer nothing to support review of those rulings.

1. *Commonality and Typicality* — Petitioners inaccurately state that the Court of Appeals required that the factual underpinnings of their claims be "identical" to those of the putative class members. Pet. 14.[16] Neither it, nor the District Court, held any such thing.

Both the District Court and the Court of Appeals conducted a "rigorous analysis" under Rule 23 and looked for "interrelationships" — as required by *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 158 n.13, 161 (1982) — and concluded that the diversity in treatment, physical locations, positions, decision-makers, supervisors, and other witnesses precluded a finding of commonality and typicality for either of the proposed sub-classes. Pet. App 4a-5a, 18a. The Court of Appeals concluded that "[g]iven the indi-

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adequacy of her representation, which included discussion of the evidence on the issue. *See* JA 13773-85.

[16] Petitioners also assert that "the district court failed to review or consider incidents beyond 3 years [the applicable statute of limitations] and the court of appeals looked only at 6 years. . . ." Pet. 15. But the Court of Appeals considered the time-barred incidents and concluded that they would suffer the "infirmities" as the timely events that were at issue. Pet. App. 13a n.5.

vidualized nature of plaintiffs' claims in each subclass, we hold that the district court did not err in holding plaintiffs failed to satisfy the commonality and typicality requirements of Rule 23(a)." Pet. App. 5a. Many other courts have reached the same conclusion in cases involving similar types of multi-facility employers.[17]

2. *Adequacy of Representation* — Petitioners' inability to satisfy the adequacy requirement of Rule 23(a)(4) *alone* justified denial of class certification. In this regard, the Court of Appeals concluded:

> We also find no error in the district court's conclusion that adequacy of class representation was lacking in this case. . . . The district court noted that class counsel had made significant errors in this action, both of substance and form. The court further questioned counsel's financial ability to represent a class of this size, noting

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[17] *See, e.g., Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1008 (11th Cir. 1997) (claims of racially hostile work environment are "factually very diverse"); *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 278 (4th Cir. 1980) (reversing class certification order, noting the district court's "apparent failure to appreciate the significance of the dispersion of [the employer's] work force . . . throughout a great number of geographically separated facilities"); *Lang v. Kansas City Power & Light Co.*, 199 F.R.D. 640, 647 (W.D. Mo. 2001) (commonality and typicality absent when hostile work environment claims applied to two different physical facilities); *Lott v. Westinghouse Savannah River Co.*, 200 F.R.D. 539, 550-561 (D.S.C. 2000) (no commonality when allegations spanned various sites, the membership class was diverse, and employer did not utilize a centralized decision-making process); *Abram v. United Parcel Service of America, Inc.*, 200 F.R.D. 424, 432 (E.D. Wis. 2001) (class certification denied when "decisions of apparently hundreds of center managers are implicated, requiring many individualized inquiries"); *Levels v. Akzo Nobel Salt, Inc.*, 178 F.R.D. 171, 177-178 (N.D. Ohio 1998) (certification denied when putative class members were "exposed to different co-employees, different supervisors, and different working conditions").

> that plaintiffs' expert had already threatened to withdraw from the case and to file a lawsuit over the late payment of fees.

Pet. App. 5a-6a.

Petitioners do not challenge the Court of Appeals' ruling on this issue: They do not dispute the facts or argue that the facts do not support the ruling.[18] In light of these implicit concessions, it is clear that the denial of class certification was proper and need not be reviewed on certiorari.

C. The Conclusions that Petitioners Had Not Satisfied Rule 23(b) Were Properly Affirmed.

The Court of Appeals also correctly concluded that the District Court acted well within its discretion in holding that petitioners failed to meet the requirements of either 23(b)(2) or 23(b)(3).

1. *Rule 23(b)(2)* — In yet another misconstruction of the lower courts' rulings, petitioners contend that "both courts denied class certification allegedly on the basis that [petitioners] requested monetary relief in connection with the equitable and declaratory relief demanded." Pet. 17. That is plainly incorrect.

The District Court did not deny certification based on the fact that petitioners sought monetary relief. Rather, it denied certification based on the fact that the relief sought would "relate *exclusively* or *predominantly* to money damages." Pet. App. 19a (emphasis supplied). The Court of Appeals agreed that because of the amount of the monetary demand, this case was "more properly viewed as one for monetary relief." Pet. App. 6a. And, both rulings are correct: Rule

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[18] Petitioners' only statement on this issue is made in the context of their complaint about the lack of an evidentiary hearing: "Adequacy of counsel is a factual issue upon which the court must make a sufficient inquiry." Pet. 19.

23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." Fed. R. Civ. P. 23 advisory committee's note for 1966 Amendment. *See Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994) ("in actions seeking monetary damages, classes can be certified only under Rule 23(b)(3), which permits opt-out, and not under Rules 23(b)(1) and (b)(2), which do not").[19]

2. *Rule 23(b)(3)* — With respect to Rule 23(b)(3), petitioners contend only that the lower courts incorrectly looked for "the same factual indignity in this action at the same time and under the same circumstance[s]." Pet. 18. That position is both unsupported and wrong. Specifically, the lower courts found that given the individualized nature of petitioners' substantive claims and their claims for damages, petitioners could not show that common questions of law or fact would predominate over individualized issues. Pet. 6a, 19a. These rulings were completely consistent with Rule 23 and this Court's precedent. *See* Fed. R. Civ. P. 23 advisory committee's note for 1966 Amendment (cases involving "significant questions" regarding damages may not be suitable for certification under 23(b)(3)); *Amchem Prods. v. Windsor*, 521 U.S. 591, 623-24 (1997) (Rule 23(b)(3) is not satisfied where 23(a)'s commonality requirement is not met or where plaintiffs "share little in common, either with each other or with the [putative] class members."). And, petitioners do not show otherwise.

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[19] *See also Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001) (Rule 23(b)(2) is not satisfied where the court will be called upon to "assess[] damages for . . . inherently individual injuries"); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 898 (7th Cir. 1999) (same); *Zimmerman v. Bell*, 800 F.2d 386, 389-90 (4th Cir. 1986) ("subsection (b)(2) was limited to claims where the relief sought was primarily injunctive or declaratory").

III. THE DISCOVERY ORDER WAS NOT PROPERLY APPEALED, AND DOES NOT MERIT REVIEW IN ANY EVENT.

Petitioners also complain about a commonplace discovery ruling, with which they disagree:

> The sanction in this case should have included all costs incurred and the court should not have conditioned petitioners' ability to obtain a monetary award upon their counsel divulging confidential client information to respondents, which would directly affect their case and the Muhammad case.

Pet. 20.[20]

This issue is not properly before this Court. As the record makes clear, the attorney-client issue was never raised with the District Court. JA 13953-55. Thus, petitioners were barred from raising it on appeal, the Court of Appeals properly declined to rule on it, and this Court should reject it. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002); *Singleton v. Wulff*, 428 U.S. 106, 120 (1976).

Even if this issue had been properly raised in the courts below, it is not properly before this Court. The orders about which petitioners complained in their "Supplemental Consolidated Notice of Appeal" were orders dated "February 20, 2002" and "March 2, 2002." This Supplemental Consolidated Notice of Appeal was filed on or about April 9, 2002. Thus, it clearly was untimely as to the February 20, 2002 order and to any March 2, 2002 orders. *See* Fed. R. App. P. 4(a) (30-day time limit for the filing of a notice of appeal). And, for that additional reason, the Fourth Circuit properly ignored it, as should this Court. *See United States v.*

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[20] *Muhammad v. Giant Food Inc.*, Nos. 01-1031 to -1036 (4th Cir.), is an unrelated case that was commenced against Giant by petitioners' counsel.

Robinson, 361 U.S. 220, 229 (1960) ("[T]he taking of an appeal within the prescribed time is mandatory and jurisdictional.").[21]

Finally, even if this issue had been properly preserved and properly appealed, there is no basis for review. The District Court determined that by providing the incorrect data, Giant simply made a "mistake," which was "entirely inadvertent." Pet. App. 196a. In light of this, the court concluded that petitioners who had actually incurred the additional costs were entitled only to reimbursement of their proportionate share. *Id.* And, because petitioners' counsel had not "handled this issue in a responsible manner," the District Court refused to order Giant to pay petitioners' attorney fees and costs. Pet. App. 196a.

Petitioners fail to identify any abuse of discretion with respect to these rulings; they merely voice their disagreement with the outcome. Pet. 20.[22] This simply is insufficient for

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[21] To the extent that petitioners were attempting to appeal the April 2, 2002 order denying their request to alter and amend, they have never to this day made any effort to correct the error in their Supplemental Consolidated Notice of Appeal. Thus, any issues pertaining to the April 2, 2002 order were never properly appealed to the Fourth Circuit and are not properly before this Court. *See Becker v. Montgomery*, 532 U.S. 757, 765-66 (2001) (Because Rules 3 and 4 of the Federal Rules of Appellate Procedure are "jurisdictional in nature," the notice of appeal "must contain" all of the information specified in Rule 3(c), including the precise judgment or order being appealed.).

[22] Petitioners' attorney-client privilege argument, which has been waived, is also baseless. Petitioners claim, without any support, that the facts concerning the allocation of expert payments are protected by the attorney-client privilege. Pet. 20. But it is well established that "protection of the privilege extends only to *communications* and not to facts." *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) (quotation omitted) (emphasis in original); *cf. Vingelli v. United States*, 992 F.2d 449, 454 (2d Cir. 1993) (fee information is not privileged where it is not "confidential communications made for the purpose of obtaining legal advice").

certiorari review of a discovery order. *See Cunningham v. Hamilton County*, 527 U.S. 198, 209 (1999); *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998); *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT P. WATKINS
KUMIKI GIBSON *

WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5457

* Counsel of Record

Attorneys for Respondents

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MARYLAND

[Filed Mar 20, 2002]

Civil Action No. JFM-96-2882

GREGORY CARSON et. al.,
Plaintiff,

v.

GIANT FOOD INC., et. al.,
Defendants.

Civil Action No. JFM-02-537

WILBERT SKIPPER, JR.,
Plaintiff,

v.

GIANT FOOD INC., et. al.,
Defendants.

Civil Action No. JFM-02-538

MELVYN CONNOR,
Plaintiff,

v.

GIANT FOOD INC., et. al.,
Defendants.

Civil Action No. JFM-02-539

WILLIAM INGRAM

Plaintiff,

v.

GIANT FOOD INC., et. al.,

Defendants.

Civil Action No. JFM-02-540

DAVID NEWMAN,

Plaintiff,

v.

GIANT FOOD INC., et. al.,

Defendants.

Civil Action No. JFM-02-541

ANTHONY BLOCKER

Plaintiff,

v.

GIANT FOOD INC., et. al.,

Defendants.

Civil Action No. JFM-02-542

MAURICE MATHEWS

Plaintiff,

v.

GIANT FOOD INC., et. al.,

Defendants.

Civil Action No. JFM-02-543

W. KIRB QUALLS, JR.,

Plaintiff,

v.

GIANT FOOD INC., et. al.,

Defendants.

Civil Action No. JFM-02-544

JOHN DALLAS, JR. AND DAVID JONES,

Plaintiffs,

v.

GIANT FOOD INC., et. al.,

Defendants.

CONSOLIDATED NOTICE OF APPEAL

Plaintiffs Wilbert Skipper, Melvyn Connor, William Ingrain, David Newman, Anthony Blocker, Maurice Mathews, W. Kirb Quails, John Dallas and David Jones hereby file this Consolidated Notice of Appeal in the above captioned matters. They hereby notice an appeal of the

Honorable J. Frederick Motz's Orders denying Class Certification and the dismissal of each of their individual claims. See Attached Nine (9) Memorandums, Opinions and Orders.[1]

Respectfully Submitted,

/s/ Jo Ann P. Myles
JO ANN P. MYLES
LAW OFFICE OF JO ANN P. MYLES
1300 Mercantile Lane
Suite 139-S
Largo, Maryland 20774
Bar No. 04412
301-474-0261

Dated: March 19, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 19th of March 2002 I had mailed by postage prepaid Plaintiffs Skipper, Connor, Ingram, Newman, Blocker, Mathews, Qualls, Dallas and Jones, Consolidated Motice of Appeal To Defendants Counsel:

ROBERT WATKINS, ESQUIRE
KUMIKI GIBSON, ESQUIRE
WILLIAMS & CONNOLLY LLP
725 Twelfth Street N.W.
Washington, D.C. 20005

/s/ Jo Ann P. Myles
Jo Ann P. Myles

---

[1] Pursuant to the Court's February 20, 2002 Order *in Carson et. al. v. Giant Food, Inc. et. al.* JFM-96.2882 Paper Number 313 the above plaintiffs are fling this Consolidated Appeal . According to the Court's Order they are only required to pay one fling fee. See Exhibit 1. Paper Number 313. Please also note that no Appeal is being taken on the part of Plaintiff Gregory Carson. The nine Plaintiffs are taking an Appeal of the Court's Order denying Class Certification in Carson et. al. v. Giant Food, Inc. et. al. which they filed.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MARYLAND

Civil Action No. JFM-96-2882

GREGORY CARSON et. al.,
Plaintiff,

v.

GIANT FOOD INC., et. al.,
Defendants.

Civil Action No. JFM-02-537

WILBERT SKIPPER, JR.,
Plaintiff,

v.

GIANT FOOD INC., et. al.,
Defendants.

Civil Action No. JFM-02-538

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Plaintiff,

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GIANT FOOD INC., et. al.,
Defendants.

Civil Action No. JFM-02-539

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Plaintiff,

v.

GIANT FOOD INC., et. al.,

Defendants.

Civil Action No. JFM-02-540

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Defendants.

Civil Action No. JFM-02-541

ANTHONY BLOCKER

Plaintiff,

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GIANT FOOD INC., et. al.,

Defendants.

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Plaintiff,

v.

GIANT FOOD INC., et. al.,

Defendants.

Civil Action No. JFM-02-543

W. KIRB QUALLS, JR.,

Plaintiff,

v.

GIANT FOOD INC., et. al.,

Defendants.

Civil Action No. JFM-02-544

JOHN DALLAS, JR. AND DAVID JONES,

Plaintiffs,

v.

GIANT FOOD INC., et. al.,

Defendants.

SUPPLEMENTAL CONSOLIDATED NOTICE OF APPEAL

Plaintiffs Wilbert Skipper, Melvyn Connor, William Ingram, David Newman, Anthony Blacker, Maurice Mathews, W. Kirb Quails, John Dallas and David Jones hereby file this Supplemental Consolidated Notice of Appeal in the above captioned matters. They hereby supplement their

Consolidated notice of appeal fled on March 19, 2002 by also noticing an appeal of the Honorable J. Frederick Motz's Orders dated February 20, 2002 and March 2, Orders denying their award for all costs, fees and as well as all other issues concerning the award of Sanctions in the above captioned matter. See Attached the two (2) Memorandums, Opinions and Orders.[1]

Respectfully Submitted,

/s/ Jo Ann P. Myles
JO ANN P. MYLES
LAW OFFICE OF JO ANN P. MYLES
1300 Mercantile Lane
Suite 139-S
Largo, Maryland 20774
Bar No. 04412
301-474-0261

Dated: April 9, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 9th of April 2002 I had mailed by postage prepaid Plaintiffs Skipper, Connor, Ingram, Newman, Blacker, Mathews, Quails, Dallas and Jones' Supplemental Consolidated Notice of Appeal To Defendants Counsel:

ROBERT WATKINS, ESQUIRE
KUMIKI GIBSON, ESQUIRE
WILLIAMS & CONNOLLY LLP
725 Twelfth Street N.W.
Washington, D.C. 20005

/s/ Jo Ann P. Myles
Jo Ann P. Myles

---

[1] Plaintiffs' original appeal in this matter was filed on March 19, 2002. The above plaintiffs now take an appeal of the Court's two subsequent orders concerning their motions for sanctions. Plaintiffs also reserve the right to appeal other issues that were litigated in the above captioned matter.

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBER OF
J. FREDERICK MOTZ
UNITED STATES DISTRICT JUDGE

101 W. LOMBARD STREET
BALTIMORE, MARYLAND 21201
(410) 962-0782
FAX (410) 962-2698

February 20, 2002

Memo To Counsel Re: *Gregory Carson*, et al. v. *Giant Food, Inc.*, et al. Civil No. JFM-96-2882

Dear Counsel:

I have reviewed the papers submitted in connection with plaintiff's motion for sanctions against Giant for Giant's failure to provide complete information during discovery.

I have concluded that Giant should reimburse Plaintiffs in the amount of $25,000. In making this ruling, I am not finding that Giant failed to act in good faith by initially submitting incorrect data. Nevertheless, it seems to me that a cost shifting is appropriate since it is clear that Plaintiffs were put to additional expense by Giant's mistake. The record establishes that an additional $8,000 was spent on Dr. Zellner's first report that would not have been incurred if Giant initially submitted the correct data. Likewise, a second report would have been unnecessary. However, since the production of full and complete data by Giant in the first instance presumably would have increased to some extent the cost of the first report, I am deducting $2,364.00 from the $19,364.00 claimed by plaintiffs for preparing the second report.

Despite the informal nature of this ruling, it shall constitute an Order of Court, and the Clerk is directed to docket it accordingly.

Very truly yours,

J. Frederick Motz
United States District Judge

cc: Court File

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Filed Apr 3, 2002]

Civil No. JFM-96-2882

GREGORY CARSON

v.

GIANT FOOD, INC., ET AL.

MEMORANDUM

By a letter dated February 24, 2002, plainti ffs have informally requested this court to alter and amend its ruling in the letter order dated February 20, 2002, awarding plaintiffs $25,000 for work done by Dr. Harriet Zellner that would not have had to be performed but for a mistake made by defendant Giant Food in compiling statistical information that was forwarded to Dr. Zellner.

First, plaintiffs ask that the amount of the award be increased by $16,075 because of attorney fees and costs that three of the plaintiffs (Messrs. Carson, Newman, and Blocker) incurred in obtaining the $25,000 award. I previously ruled that plaintiffs should not be compensated for these attorney fees and costs. I adhere to that ruling. As I previously stated, Giant's mistake was entirely inadvertent. Moreover, if plaintiffs had handled this issue in a responsible manner, their attorney fees and costs would have been negligible.

Second, plaintiffs' counsel requests that the $25,000 be awarded not to all plaintiffs but only to three of them, Messrs. Carson, Newman, and Blocker, under the theory that they

were the only plaintiffs to pay the additional costs. The record demonstrates that at least one other plaintiff in this case, Mr. Mungro, has asserted a claim for reimbursement from the $25,000. Moreover, it also appears from the record that some or all of the plaintiffs in the related Muhammad litigation may also have valid reimbursement claims. Finally, based upon the February 24, 2000 letter, it appears that plaintiffs' counsel may also have contemplated being paid $16,075 for attorney fees and costs out of the award although the award expressly was for fees paid to Dr. Zellner in connection with preparing two statistical reports.

Based on the record before me, it seems that plaintiffs' counsel is confused as to the basis of the $25,000 award. $8000 was awarded for additional expenses associated with Dr. Zellner's first statistical report. $17,000 was awarded for additional expenses associated with Dr. Zellner's second statistical report. It is unreasonable to argue that only Messrs. Carson, Newman, and Blocker paid Dr. Zellner for the overpayments that have been awarded. Numerous plaintiffs in Muhammad and Carson contributed to the total costs of the two reports.

I have determined that the most efficient and fair way to administer the $25,000 is to place upon plaintiffs' counsel, Jo Ann P. Myles, Esq., the responsibility to compute each plaintiffs share of the award.[1] Ms. Myles is to determine the proportional contribution of each plaintiff, whether a Muhammad, plaintiff or a Carson, plaintiff, to each report, and then determine, based upon that calculation, the amount of reimbursement each plaintiff is entitled to. For example, if Plaintiff A contributed ten percent of the cost of the first statistical report, he is entitled to ten percent of $8000 ($800).

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[1] None of the $25,000 should be paid to Ms. Myles. Nor should any of the award be paid to Dr. Zellner in connection with her costs related to preparing materials in support of plaintiffs' renewed motion for sanctions.

If Plaintiff B contributed seven percent of the cost of the second statistical report, he is entitled to seven percent of $17,000 ($1,190).

Ms. Myles is directed to submit her computations to the court, sending copies to counsel for Giant and to Mr. Mungro on or before April 26, 2002. If either Giant or Mr. Mungro have any objection to the calculations, they should file their objections on or before May 10, 2002. If no objections are filed, Giant should then issue separate checks to each plaintiff in the amount shown on Ms. Myles' computation sheet.

Date:

/s/ J. Frederick Motz
J. Frederick Motz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

[Filed Apr 3, 2002]

Civil No. JFM-96-2882

GREGORY CARSON

v.

GIANT FOOD, INC., ET AL.

ORDER

For the reasons stated in the accompanying memorandum, it is, this 2nd day of April 2002.

ORDERED

1. The clerk is directed to file the attached February 24, 2002 letter from plaintiffs' counsel to the court as a motion to alter and amend the ruling made by this court on February 20, 2002;

2. The motion is denied; and

3. The $25,000 award should be paid in accordance with the procedure set forth in the accompanying Memorandum.

/s/ J. Frederick Motz
J. Frederick Motz
United States District Judge

FEDERAL CIVIL JUDICIAL PROCEDURE and RULES

2003 REVISED EDITION

As amended to May 23, 2003

Includes Proposed Amendments adopted March 27, 2003, to become effective December 1, 2003, absent contrary Congressional action for Federal Rules of Civil Procedure, Evidence and Appellate Procedure.

Rules of Civil Procedure
Rules of Judicial Panel on Multidistrict Litigation
Rules—Habeas Corpus Cases
Rules—Motion Attacking Sentence Rules of Evidence
Rules of Appellate Procedure
Rules of the Supreme Court

Includes laws through Public Law 108-23, May 19, 2003

Title 28, Judiciary and Judicial Procedure
Act June 25, 1948, c. 646, §§ 2 to 39
Appendix:

Judicial Personnel Financial Disclosure Requirements [Repealed]

Development of Mechanisms for Resolving Minor Disputes [Codified]

Constitution of the United States

Title 5, Government Organization and Employees

App. 4—Financial Disclosure Requirements of Federal Personnel

Consolidated Index

THOMSON
WEST

Mat#40070977

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods

for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those

whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) when appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to sib whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be

given to all members of the class in such manner as the court directs.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 24, 1998, eff. Dec. 1, 1998.)

* * *

ADVISORY COMMITTEE NOTES

1966 Amendment

Difficulties with the original rule. The categories of class actions in the original rule were defined in terms of the abstract nature of the rights involved: the so-called "true" category was defined as involving "joint, common, or secondary rights"; the "hybrid" category, as involving "several" rights related to "specific property"; the "spurious" category, as involving "several" rights affected by a common question and related to common relief. It was thought that the definitions accurately described the situations amenable to the class-suit device, and also would indicate the proper extent of the judgment in each category, which would in turn help to determine the res judicata effect of the judgment if questioned in a later action. Thus the judgments in "true" and "hybrid" class actions would extend to the class (although in somewhat different ways); the judgment in a "spurious" class action would extend only to the parties including intervenors. See Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 Geo.L.J. 551, 570-76 (1937).

In practice the terms "joint," "common," etc., which were used as the basis of the Rule 23 classification proved obscure and uncertain. See Chafee, *Some Problems of Equity* 245-46, 256-57 (1950); Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. of Chi.L.Rev. *684, 707* & n. 73 (1941); Keeffe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 Corn.L.Q. 327, 329-36 (1948); *Developments in the Law: Multiparty Litigation in the Federal Courts*, 71 Harv. L.Rev. 874, 931 (1958); Advisory Committee's Note to Rule 19, as amended. The courts had considerable difficulty with these terms. See, e.g., *Gullo v. Veteran' Coop. H. Assn.*, 13 F.R.D. 11 (D.D.C.1952); *Shipley v. Pittsburgh & L.E.R. Co.*, 70 F.Supp. 870 (W.D.Pa.1947); *Deckert v. Independence Shares Corp.*, 27 F.Supp. 763 (E.D.Pa.1939), rev'd 108 F.2d 51 (3d Cir. 1939), rev'd, 311 U.S. 282 (1940), on remand, 39 F.Supp. 592 (E.D.Pa.1941), rev'd sub nom. *Pennsylvania Co. for Ins. on Lives v. Deckert*, 123 F.2d 979 (3d Cir.1941) (see Chafee, supra, at 264-65).

Nor did the rule provide an adequate guide to the proper extent of the judgments in class actions. First, we find instances of the courts classifying actions as "true" or intimating that the judgments would be decisive for the class where these results seemed appropriate but were reached by dint of depriving the word "several" of coherent meaning. See, e.g., *System Federation No. 91 v. Reed*, *180* F.2d 991 (6th Cir.1950); *Wilson v. City of Paducah*, 100 F.Supp. 116 (W.D.Ky.1951); *Citizens Banking Co. v. Montieello State Bank*, 143 F.2d 261 (8th Cir.1944); *Redmond v. Commerce Trust Co.*, 144 F.2d 140 (8th Cir.1944), *cert. denied*, 323 U.S. 776 (1944); *United States v. American Optical Co.*, 97 F.Supp. 66 (N.D.Ill.1951); *National Hairdressers' & C. Assn. v. Philad Co.*, 34 F.Supp. 264 (D.De1.1940); 41 F.Supp. 701 (D.Del.1940), aff'd mem., 129 F.2d 1020 (3d Cir.1942). second, we find cases classified by the courts as "spurious" in which, on a realistic view, it would seem fitting for the judgments to extend to the class. See, e.g., *Knapp v. Bankers*

Sec. Corp., 17 F.R.D. 245 (E.D.Pa.1954), aff d 230 F.2d *717* (3d *Cir.1956); Gieseeke v. Denver Tramway Corp.*, 81 F.Supp. 957 (D.Del.1949); *York v. Guaranty Trust Co.*, 143 F.2d 503 (2d Cir.1944), rev'd on grounds not here relevant, 326 U.S. 99 (1945) (see *Chafee*, supra, at 208); cf. *Webster Eisenlohr, Inc. v. Kalodner*, 145 F.2d 316, 320 (3d Cir.1944), *cert. denied*, 325 U.S. 867 (1945). But cf. the early decisions, *Duke of Bedford v. Ellis, [1901] A.C. 1; Sheffield Waterworks v. Yeoman*, L.R. 2 Ch.App. 8 (1866); *Brown v. Vermuden*, 1 Ch.Cas. 272, 22 Eng.Rep. 796 (1676).

The "spurious" action envisaged by original Rule 23 was in any event an anomaly because, although denominated a "class" action and pleaded as such, it was supposed not to adjudicate the rights or liabilities of any person not a party. It was believed to be an advantage of the "spurious" category that it would invite decisions that a member of the "class" could, like a member of the class in a "true" or "hybrid" action, intervene on an ancillary basis without being required to show an independent basis of Federal jurisdiction, and have the benefit of the date of the commencement of the action for purposes of the statute of limitations. See 3 Moore's *Federal Practice*, pars. 23.10[1], 23.12 (2d ed.1963). These results were attained in some instances but not in others. On the statute of limitations, see *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir.1961), pet. cert. dism., 371 U.S. 801(1963); but cf. P. *W. Husserl, Inc, v. Newman*, 25 F.R.D. 264 (S.D.N.Y.1960); *Athas v. Day*, 161 F.Supp. 916 (D.Colo.1958). On ancillary intervention, see *Amen v. Black*, 234 F.2d 12 (10th Cir.1956), cert. granted, 352 U.S. 888 (1956), dism. on stip., 355 U.S. 600 (1958); but *cf. Wagner v. Kemper*, 13 F.R.D. 128 (W.D.Mo.1952). The results, however, can hardly depend upon the mere appearance of a "spurious" category in the rule; they should turn on more basic considerations. See discussion of subdivision (c)(1) below.

Finally, the original rule did not squarely address itself to the question of the measures that might be taken during the course of the action to assure procedural fairness, particularly giving notice to members of the class, which may in turn be related in some instances to the extension of the judgment to the class. See Chafee, supra, at 230-31; Keeffe, Levy & Donovan, supra; *Developments in the law*, supra, 71 Harv. L.Rev. at 937-38; Note, *Binding Effect of Class Actions*, 67 Harv.L.Rev. 1059, 1062-65 (1954); Note, *Federal Class Actions: A Suggested Revision of Rule 23*, 46 Colum.L.Rev. 818, 833-36 (1946); Mich.Gen.Court R. 208.4 (effective Jan. 1, 1963); Idaho R.Civ.P. 23(d); Minn.R.Civ.P. 23.04; N.Dak.R.Civ.P. 23(d).

The amended rule describes in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions.

Subdivision (a) states the prerequisites for maintaining any class action in terms of the numerousness of the class making joinder of the members impracticable, the existence of questions common to the class, and the desired qualifications of the representative parties. See Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 Buffalo L.Rev. 433, 458-59 (1960); 2 Baryon & Holtzoff, *Federal Practice & Procedure* § 562, at 265, § 572, at 351-52 (Wright ed.1961). These, are necessary but not sufficient conditions for a class action. See, e.g., *Giordano v. Radio Corp. of Am.*, 183 F.2d 558, 560 (3d Cir.1950); *Zachman v. Erwin*, 186 F.Supp. 681(S.D.Tex.1959); *Baim & Blank, Inc, v. Warren-Connelly Co., Inc.*, 19 F.R.D. 108 (S.D.N.Y.1956). Subdivision (b) describes the additional elements which in varying situations justify the use of a class action.

Subdivision (b)(1). The difficulties which would be likely to arise if resort were had to separate actions by or against the individual members of the class here furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device. The considerations stated under clauses (A) and (B) are comparable to certain of the elements which define the persons whose joinder in an action is desirable as stated in Rule 19(a), as amended. See amended Rule 19(a)(2)(i) and (ii), and the Advisory Committee's Note thereto; Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 Colum.L.Rev. 1254, 1259-60 (1961); cf. 3 Moore, supra, par. 23.08, at 3435.

Clause (A): One person may have rights against, or be under duties toward, numerous persons constituting a class, and be so positioned that conflicting or varying adjudications in lawsuits with individual members of the class might establish incompatible standards to govern his conduct. The class action device can be used effectively to obviate the actual or virtual dilemma which would thus confront the party opposing the class. The matter has been stated thus: "The felt necessity for a class action is greatest when the courts are called upon to order or sanction the alteration of the status quo in circumstances such that a large number of persons are in a position to call on a single person to alter the status quo, or to complain if it is altered, and the possibility exists that [the] actor might be called upon to act in inconsistent ways." Louisell & Hazard, *Pleading and Procedure: State and Federal* 719 (1962); see *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 366-67 (1921). To illustrate: Separate actions by individuals against a municipality to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular appropriation or to compel or invalidate an assessment, might create a risk of inconsistent or varying determinations. In the same way, individual litigations of the rights and duties of riparian owners, or of landowners' rights and duties respecting a claimed nuisance, could create a

possibility of incompatible adjudications. Actions by or against a class provide a ready and fair means of achieving unitary adjudication. See *Maricopa County Mun. Water Con. Dist. v. Loony*, 219 F.2d 529 (9th Cir.1955); *Rank v. Krug*, 142 F.Supp. 1, 154-59 (S.D.Calif.1956), on *app., State of California v. Rank*, 293 F.2d 340, 348 (9th Cir.1961); *Gart v. Cole*, 263 F.2d 244 (2d Cir.1959), *cert. denied* 359 U.S. 978 (1959); cf. *Martinet v. Maverick Cty. Water Con. & Imp. Dist.*, 219 F.2d 666 (5th Cir.1955); 3 Moore, supra, par. 23.11 [2], at 3458-59.

Clause (B): This clause takes in situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, might do so as a practical matter. The vice of an individual action would lie in the fact that the other members of the class, thus practically concluded, would have had no representation in the lawsuit. In an action by policy holders against a fraternal benefit association attacking a financial reorganization of the society, it would hardly have been practical, if indeed it would have been possible, to confine the effects of a validation of the reorganization to the individual plaintiffs. Consequently a class action was called for with adequate representation of all members of the class. See *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921); *Waybright v. Colombian Mut. Life Ins. Co.*, 30 F.Supp. 885 (W.D.Tenn.1939); cf. *Smith v. Swormstedt*, 16 How. (57 U.S.) 288 (1853). For much the same reason actions by shareholders to compel the declaration of a dividend[,] the proper recognition and handling of redemption or pre-emption rights, or the like (as actions by the corporation for corresponding declarations of rights), should ordinarily be conducted as class actions, although the matter has been much obscured by the insistence that each shareholder has an individual claim. See *Knapp v. Bankers Securities Corp.*, 17 F.R.D. 245 (E.D.Pa.1954), aff d, 230 F.2d 717 (3d Cir. 1956); *Giesecke v. Denver Tramway Corp.*, 81 F.Supp..957 (D.Del.

1949); *Zahn v. Transamerica Corp.*, 162 F.2d 36 (3d Cir. 1947); *Speed v. Transamerica Corp.*, 100 F.Supp. 461 (D.Del.1951); *Sobel v. Whinier Corp.*, 95 F.Supp. 643 (E.D. Mich.1951), app. disco., 195 F.2d 361 (6th Cir. 1952); *Goldberg v. Whinier Corp.*, 111 F.Supp. 382 (E.D.Mich. 1953); *Dann v. Studebaker-Packard Corp.*, 288 F.2d 201 (6th Cir. 1961); *Edgerton v. Armour & Co.*, 94 F.Supp. 549 (S.D.Calif.1950); *Ames v. Mengel Co.*, 190 F.2d 344 (2d Cir.1951). (These shareholders' actions are to be distinguished from derivative actions by shareholders dealt with in new Rule 23.1). The same reasoning applies to an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust. See *Boesenberg v. Chicago T. & T. Co.*, 128 F.2d 245 (7th Cir.1942); *Citizens Banking Co. v. Monticello State Bank*, 143 F.2d 261 (8th Cir.1944); *Redmond v. Commerce Trust Co.*, 144 F.2d 140 (8th Cir.1944), cert. denied, 323 U.S. 776 (1944); cf. *York v. Guaranty Trust Co.*, 143 F.2d 503 (2d Cir.1944), rev'd on grounds not here relevant, 326 U.S. 99 (1945).

In various situations an adjudication as to one or more members of the class will necessarily or probably have an' adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem. Cf. *Dickinson v. Burnham*, 197 F.2d 973 (2d Cir.1952), cert. denied, 344 U.S. 875 (1952); 3 Moore, supra, at par. 23.09. The same reasoning applies to an action by a creditor to set aside a fraudulent conveyance by the debtor and to appropriate the property to

his claim, when the debtor's assets are insufficient to pay all creditors' claims. See *Heffernan v. Bennett & Armour*, 110 Cal.App.2d 564, 243 P.2d 846 (1952); *cf. City & County of San Francisco v. Market Street Ry.*, 95 Cal.App.2d 648, 213 P.2d 780 (1950). *Similar problems,* however, can arise in the absence of a fund either present or potential. A negative *or* mandatory *injunction* secured by one of a numerous class may disable the opposing party from performing claimed duties toward the other members of the class or materially affect his ability to do so. An adjudication as to movie "clearances and runs" nominally affecting only one exhibitor would often have practical effects on all the exhibitors in the same territorial area. *Cf. United States v. Paramount Pictures, Inc.*, 66 F.Supp. 323, 341-46 (S.D.N.Y. 1946); 334 U.S. 131, 144-48 (1948). Assuming a sufficiently numerous class of exhibitors, a class action would be advisable. (Here representation of subclasses of exhibitors could become necessary; see subdivision (c)(3)(B).)

Subdivision (b)(2). This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. Declaratory relief "corresponds" to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief. The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.

Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of

specific enumeration. See *Potts v. Flax*, 313 F.2d 284, (5th *Cir.1963); Bailey v. Patterson*, 323 F.2d 201 (5th Cir.1963), *cent. denied*, 376 U.S. 910, (1964); *Brunson v. Board of Trustees of School District No. 1, Clarendon Cty., S.C.*, 311 F.2d 107 .(4th Cir. 1962), cert. denied, 373 U.S. 933 (1963); *Green v. School B L of Roanoke, Va.*, 304 F.2d 118 (4th Cir. 1962); *Orleans Parish School Bd. v. Bush*, 242 F.2d 156 (5th Cir. 1957), *cert. denied*, 354 U.S. 921 (1957); *Mannings v. Board of Public Inst. of Hillsborough County, Fla.*, 277 F.2d 370 (5th , Cir. 1960); *Northcross v. Board of Ed. of City of Memphis*, 302 F.2d 818 (6th Cir.1962), *cert. denied*, 370 U.S. 944 (1962); *Frasier v. Board of Trustees of Univ. of N.C.*, 134 F.Supp. 589 (M.D.N.C.1955, 3-judge court), affd 350 U.S. 979 (1956). Subdivision (b)(2) is not limited to civil-rights cases. Thus an action looking to specific or declaratory relief could be brought by a numerous class of purchasers, say retailers of a given description, against a seller alleged to have undertaken to sell to that class at prices higher than those set for other purchasers, say retailers of another description, when the applicable law forbids such a pricing differential.. So also a patentee of a machine, charged with selling or licensing the machine on condition that purchasers or licensees also purchase or obtain licenses to use an ancillary unpatented machine, could be sued on a class basis by a numerous group of purchasers or licensees, or by a numerous group of competing sellers or licensors of the unpatented machine, to test the legality of the "tying" condition.

Subdivision (b)(3). In the situations to which this subdivision relates, class-action treatment is not as clearly called for as in those described above, but it may nevertheless be convenient and desirable depending upon the particular facts. Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly

situated, without sacrificing procedural fairness or bringing about other undesirable results. Cf. *Chafee*, supra, at 201.

The court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device. In this view, a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed. See *Oppenheimer v. F. J. Young & Co., Inc.*, 144 F.2d 387 (2d Cir. 1944); *Miller v. National City Bank of N.Y*, 166 F.2d 723 (2d Cir. 1948); and for like problems in other contexts, see *Hughes v. Encyclopaedia Britannica*, 199 F.2d 295 (7th Cir.1952); *Sturgeon v. Great Lakes Steel Corp.*, 143 F.2d 819 (6th Cir. 1944). A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried. See *Pennsylvania R.R. v. United States*, 111 F.Supp. 80 (D.N.J.1953); cf. *Weinstein*, supra, 9 Buffalo L.Rev. at 469. Private damage claims by numerous individuals arising out of concerted antitrust violations may or may not involve predominating common questions. See *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir.1961), pet, cert. disco., 371 U.S. 801(1963); *cf. Weeks v.*

Bareco Oil Co., 125 F.2d 84 (7th Cir. 1941); *Kainz v. Anheuser-Busck Inc.*, *194* F.2d 737 (7th Cir.1952); *Hess v. Anderson, Clayton & Co.*, 20 F.R.D. 466 (S.D.Calif.1957).

That common questions predominate is not itself sufficient to justify a class action under subdivision (b)(3), for another method of handling the litigious situation may be available which has greater practical advantages. Thus one or more actions agreed to by the parties as test or model actions may be preferable to a class action; or it may prove feasible and preferable to consolidate actions. Cf. Weinstein, supra, 9 Buffalo L.Rev. at 438-54. Even when a number of separate actions are proceeding simultaneously, experience shows that the burdens on the parties and the courts can sometimes be reduced by arrangements for avoiding repetitious discovery or the like. Currently the Coordinating Committee on Multiple Litigation in the United States District Courts (a subcommittee of the Committee on Trial Practice and Technique of the Judicial Conference of the United States) is charged with developing methods for expediting such massive litigation. To reinforce the point that the court with the aid of the parties ought to assess the relative advantages of alternative procedures for handling the total controversy, subdivision (b)(3) requires, as a further condition of maintaining the class action, that the court shall find that that procedure is "superior" to the others in the particular circumstances.

Factors (A)-(D) are listed, non-exhaustively, as pertinent to the findings. The court is to consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit. See *Weeks v. Bareco Oil Co.*, 125 F.2d 84, 88-90, 93-94 (7th Cir. 1941) (anti-trust action); see also *Pentland v. Drano Corp.*, 152 F.2d 851 (3d Cir. 1945), and Chafee, supra, at 273-75, regarding policy of Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C. § 216(b), prior to amendment by Portal-to-Portal Act of 1947, § 5(a). [The present provisions of 29

U.S.C. § 216(b) are not intended to be affected by Rule 23, as amended.]

In this connection the court should inform itself of any litigation actually pending by or against the individuals. The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical; the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable. The burden that separate suits would impose on the party opposing the class, or upon the court calendars, may also fairly be considered. (See the discussion, under subdivision (c)(2) below, of the right of members to be excluded from the class upon their request.)

Also pertinent is the question of the desirability of concentrating the trial of the claims in the particular forum by means of a class action, in contrast to allowing the claims to be litigated separately in forums to which they would ordinarily be brought. Finally, the court should consider the problems of management which are likely to arise in the conduct of a class action.

Subdivision (c)(1). In order to give clear definition to the action, this provision requires the court to determine, as early in the proceedings as may be practicable, whether an action brought as a class action is to be so maintained. The determination depends in each case on satisfaction of the terms of subdivision (a) and the relevant provisions of subdivision (b).

An order embodying a determination can be conditional; the court may rule, for example, that a class action may be maintained only if the representation is improved through intervention of additional parties of a stated type. A deter-

mination once made can be altered or amended before the decision on the merits if, upon fuller development of the facts, the original determination appears unsound. A negative determination means that the action should be stripped of its character as a class action. See subdivision (d)(4). Although an action thus becomes a nonclass action, the court may still be receptive to interventions before the decision on the merits so that the litigation may cover as many interests as can be conveniently handled; the questions whether the intervenors in the nonclass action shall be permitted to claim "ancillary" jurisdiction or the benefit of the date of the commencement of the action for purposes of the statute of limitations are to be decided by reference to the laws governing jurisdiction and limitations as they apply in particular contexts.

Whether the court should require notice to be given to members of the class of its intention to make a determination, or of the order embodying it, is left to the court's discretion under subdivision (d)(2).

Subdivision (c)(2) makes special provision for class actions maintained under subdivision (b)(3). As noted in the discussion of the latter subdivision, the interests of the individuals in pursing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b)(3), this individual interest is respected. Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request. A member who does not request exclusion may, if he wishes, enter an appearance in the action through his counsel; whether or not he does so, the judgment in the action will embrace him.

The notice[,] setting forth the alternatives open to the members of the class, is to be the best practicable under the circumstances, and shall include individual notice to the members who can be identified through reasonable effort.

(For further discussion of this notice, see the statement under subdivision (d)(2) below.)

Subdivision (c)(3). The judgment in a class action maintained as such to the end will embrace the class, that is, in a class action under subdivision (b)(1) or (b)(2), those found by the court to be class members; in a class action under subdivision (b)(3), those to whom the notice prescribed by subdivision (c)(2) was directed, excepting those who requested exclusion or who are ultimately found by the court not to be members of the class. The judgment has this scope whether it is favorable or unfavorable to the class. In a (b)(1) or (b)(2) action the judgment "describes" the members of the class, but need not specify the individual members; in a (b)(3) action the judgment "specifies" the individual members who have been identified and described the others.

Compare subdivision (c)(4) as to actions conducted as class actions only with respect to particular issues. Where the class-action character of the lawsuit is based solely on the existence of a "limited fund," the judgment, while extending to all claims of class members against the fund, has ordinarily left unaffected the personal claims of nonappearing members against the debtor. See 3 Moore, supra, par. 23.11[4].

Hitherto, in a few actions conducted as "spurious" class actions and thus nominally designed to extend only to parties and others intervening before the determination of liability, courts have held or intimated that class members might be permitted to intervene after a decision on the merits favorable to. their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision. See, as to the propriety of this so-called "one-way" intervention in "spurious" actions, the conflicting views expressed in *Union Carbide & Carbon Corp. v. Nisley*, 800 F.2d 561 (10th Cir. 1961), pet. cert. dism., 371 U.S. 801(1963); *York v. Guaranty Trust Co.*, 143 F.2d 503, 529 (2d Cir. 1944), rev'd on grounds not here

relevant, 326 U.S. 99 (1945); *Pentland v. Drano Corp.*, 152 F.2d 851, 856 (3d Cir. 1945); *Speed v. Transamerica Corp.*, 100 F.Supp. 461, 463 (D.Del.1951); *State Wholesale Grocers* V. *Great Atl. & Pac. Tea Co.*, 24 F.R.D. 510 (N.D.Ill.1959); *Alabama Ind. Serv. Stat. Assn. v. Shell Pet. Corp.*, 28 F.Supp. 386, 390 (N.D.Ala.1939); *Tolliver v. Cudahy Packing* Co., 39 F.Supp. 337, 339 (E.D.Tenn.1941); Kalven & Rosenfield, supra, 8 U. of Chi.L.Rev. 684 (1941); Comment, 53 Nw.U.L.Rev. 627, 632-33 (1958); *Developments in the Law*, supra; 71 Harv.L.Rev. at 935; 2 Barron & Holtzoff, supra, § 568; but cf. *Lockwood v. Hercules Powder Co.*, 7 F.R.D. 24, 28-29 (W.D.Mo.1947); *Abram v. San Joaquin Cotton Oil Co.*, 46 F.Supp. 969, 976-77 (S.D.Calif.1942); Chafee, supra, at 280, 285; 3 Moore, supra, par. 23.12, at 3476. Under proposed subdivision (c)(3), one-way intervention is excluded; the action will have been early determined to be a class or nonclass action, and in the former case the judgment, whether or not favorable, will include the class, as above stated.

Although thus declaring that the judgment in a class action includes the class, as defined, subdivision (c)(3) does not disturb the recognized principle that the court conducting the action cannot predetermine the *res judicata* effect of the judgment; this can be tested only in a subsequent action. See Restatement, Judgments § 86, comment (h), § 116 (1942). The court, however, in framing the judgment in any suit brought as a class action, must decide what its extent or coverage shall be, and if the matter is carefully considered, questions of *res judicata* are less likely to be raised at a later time and if raised will be more satisfactorily answered. See Chafee, supra, at 294; Weinstein, supra, 9 Buffalo L.Rev. at 460.

Subdivision (c)(4). This provision recognizes that an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case the action may retain its "class" character only through the adjudication of

liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.

Two or more classes may be represented in a single action. Where a class is found to include subclasses divergent in interest, the class may be divided correspondingly, and each subclass treated as a class.

Subdivision (d) is concerned with the fair and efficient conduct of the action and lists some types of orders which may be appropriate.

The court should consider how the proceedings are to be arranged in sequence, and what measures should be taken to simplify the proof and argument. See subdivision (d)(1). The orders resulting from this consideration, like the others referred to in subdivision (d), may be combined with a pretrial order under Rule 16, and are subject to modification as the case proceeds.

Subdivision (d)(2) sets out a non-exhaustive list of possible occasions for orders requiring notice to the class. Such notice is not a novel conception. For example, in "limited fund" cases, members of the class have been notified to present individual claims after the basic class decision. Notice has gone to members of a class so that they might express any opposition to the representation, see *United States v. American Optical Co.*, 97 F.Supp. 66 (N.D.Ill.1951), and 1950-51 CCH Trade Cases 64573-74 (par. 62869); cf. *Weeks v. Bareco Oil Co.*, 125 F.2d 84, 94 (7th Cir.1941), and notice may encourage interventions to improve the representation of the class. Cf. *Oppenheimer v. F. J. Young & Co.*, 144 F.2d 387 (2d Cir. 1944). Notice has been used to poll members on a proposed modification of a consent decree. See record in *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961).

Subdivision (d)(2) does not require notice at any stage, but rather calls attention to its availability and invokes the court's discretion. In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum. These indicators suggest that notice under subdivision (d)(2) may be particularly useful and advisable in certain class actions maintained under subdivision (b)(3), for example, to permit members of the class to object to the representation. Indeed, under subdivision (c)(2), notice must be ordered, and is not merely discretionary, to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class. This mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process to which the class action procedure is of course subject. See *Hansberry v. Lee*, 311 U.S. 32 (1940); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); cf. *Dickinson v. Burnham*, 197 F.2d 973, 979 (2d Cir.1952), and studies cited at 979 in 4; see also *All American Airways, Inc. v. Elders*, 209 F.2d 247, 249 (2d Cir.1954); *Gart v. Cole*, 263 F.2d 244, 248-49 (2d Cir. 1959), cert. denied, 359 U.S. 978 (1959).

Notice to members of the class, whenever employed under amended Rule 23, should be accommodated to the particular purpose but need not comply with the formalities for service of process. See Chafee, supra, at 230-31; *Brendle v. Smith*, 7 F.R.D. 119 (S.D.N.Y.1946). The fact that notice is given at one stage of the action does not mean that it must be given at subsequent stages. Notice is available fundamentally "for the protection of the members of the class or otherwise for the fair conduct of the action" and should not be used merely as a device for the undesirable solicitation of claims. See the discussion in *Cherner v. Transitron Electronic Corp.*, 201 F.Supp. 934 (D.Mass.1962); *Hormel v. United States*, 17 F.R.D. 303 (S.D.N.Y.1955).

In appropriate cases the court should notify interested government agencies of the pendency of the action or of particular steps therein.

Subdivision (d)(3) reflects the possibility of conditioning the maintenance of a class action, e.g., on the strengthening of the representation, see subdivision (c)(1) above; and recognizes that the imposition of conditions on intervenors may be required for the proper and efficient conduct of the action.

As to orders under subdivision (d)(4), see subdivision (c)(1) above.

Subdivision (e) requires approval of the court, after notice, for the dismissal or compromise of any class action.

* * * *

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but

before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex party unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is

entered, but only if all the following conditions are satisfied:

(A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier;

(B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and

(C) the court finds that no party would be prejudiced.

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a)(1) does not require a separate document, when the judgment or order is entered in the civil docket under Federal, Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a)(1) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

• the judgment or order is set forth on a separate document, or

• 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of

Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order.

(b) Appeal in a Criminal Case.

(1) Time for Filing a Notice of Appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of the judgment or order being appealed; or

(ii) the filing of a notice of appeal by any defendant.

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision, sentence, or order—but before the entry of the judgment or order-is treated as filed on the date of and after the entry.

(3) Effect of a Motion on a Notice of Appeal.

(A) If a defendant timely makes any, of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 10 days after the entry of the order disposing of the last such remaining motion, or within 10 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 10 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

(B) A notice of appeal filed after the court announces a decision, sentence, or order but before it disposes of any of the motions referred to in Rule 4(b)(3)(A)-becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion; or

(ii) the entry of the judgment of conviction.

(C) A valid notice of appeal is effective—without amendment—to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

(4) Motion for Extension of Time. Upon a finding of excusable neglect or good cause, the district court may—before or after the time has expired, with or without motion and notice—extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

(5) Jurisdiction. The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) Entry Defined. A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

(c) Appeal by an Inmate Confined in an Institution.

(1) If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a nota rized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(2) If an inmate files the first notice of appeal in a civil, case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice.

(3) when a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

(d) Mistaken Filing in the Court of Appeals. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.